



4310-EJ

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 79

[NPS-WASO-CR-16170; PPWOCRADIO, PCU00RP14R50000]

RIN 1024-AE17

Curation of Federally-Owned and Administered Archeological Collections

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

SUMMARY: The National Park Service proposes to amend the regulations for the curation of federally-owned and administered archeological collections to establish definitions, standards, and procedures to dispose of particular material remains that are determined to be of insufficient archaeological interest. This rule would promote more efficient and effective curation of these archeological collections.

DATES: Comments must be received by [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulation Identifier Number (RIN) 1024-AE17, by any of the following methods:

- *Federal eRulemaking portal:* <http://www.regulations.gov>. Follow instructions for submitting comments.
- *Mail to:* Stanley C. Bond, Departmental Consulting Archeologist, National Park Service, Docket No. 1024-AE17, 1201 Eye Street NW, 7th Floor (2275), Washington, DC 20005.
- *Hand deliver to:* Stanley C. Bond, Departmental Consulting Archeologist, 1201 Eye Street NW, Room 760, Washington, DC 20005.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: David A. Gadsby, Archeology Program, National Park Service, 1201 Eye Street NW, Washington, DC 20005, 202-354-2101, email: david_gadsby@nps.gov.

SUPPLEMENTARY INFORMATION:

Background

Statutory Authority and Jurisdiction

The Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa-mm) authorizes the Secretary of the Interior to promulgate regulations for the disposition of archaeological resources and other resources recovered under the authority of ARPA, the Reservoir Salvage Act (RSA; 16 U.S.C. 469-469c-2), as amended, and the Antiquities Act (16 U.S.C. 431-433). In addition, the National Historic Preservation Act (NHPA; 16 U.S.C. 470a(a)(7) and 470h-4(a)) authorizes the Secretary of the Interior to promulgate regulations for the proper curation of archeological collections created under NHPA, RSA, and ARPA. The Department of the Interior's Departmental Consulting Archeologist (DCA), located in the National Park Service (NPS), is responsible for developing regulations concerning the preservation of prehistoric and historic material remains of archaeological interest under ARPA, under the Department of the Interior's Departmental Manual "Protection of the Cultural Environment" (519 DM 2.3D).

Disposal of Particular Material Remains from Archeological Collections

The regulations at 36 CFR Part 79 establish definitions, standards, procedures, and guidelines to be followed by Federal agencies to preserve collections of prehistoric and historic material remains and associated records that generally include those resulting from a prehistoric or historic resource survey, excavation, or other study conducted in connection with a Federal action, assistance, license, or permit.

As currently written, 36 CFR Part 79 does not provide a process for Federal agencies to dispose of particular material remains from archeological collections that, after rigorous evaluation, are determined to have insufficient archaeological interest. Prehistoric or historic material remains improperly disposed of could later be rediscovered and misinterpreted by unwitting archeologists or others as evidence of activity in the distant past, so it is important to delineate appropriate methods of disposal. A proposed rule to establish procedures to discard particular material remains from Federal collections was published in the Federal Register in 1990 (55 FR 37670, September 12, 1990). The NPS received less than 10 sets of comments about the proposed rule, but these comments raised a variety of issues, including the following:

- Lack of defined terms.
- Potential for future development of archeological methods and theories that could be applied to disposed material remains.
- Qualifications of persons involved in the procedure to recommend the appropriateness of the decision to discard.
- Need for more detail about procedures to discard material remains.
- Need for procedures to determine a “representative” sample of bulky, non-diagnostic objects to be retained for future research from material remains to be discarded.

- Need for procedures to ensure that the discard of material remains would not create an artificial archeological site.

Due, in part, to the comments received, a final rule for the 1990 proposed rule was never published. Instead, the DCA decided to focus on proper curation of federally-owned and administered collections before the option to dispose of any material remains was introduced.

Proposed rule

Based on renewed interest from Federal agencies, the Department of the Interior (DOI) now proposes new sections 79.12 through 79.18, and related amendments to sections 79.2 and 79.3 of 36 CFR Part 79, to establish regulations to dispose of particular material remains from federally-owned and administered archeological collections. This rule would establish certain circumstances under which specific procedures may be used to dispose of material remains of insufficient “archaeological interest,” as this term is defined in 43 CFR 7.3(a)(1). The term “material remains,” as defined in section 79.4(1)(a) of this part, refers to artifacts, objects, specimens, and other physical evidence, including human remains, of a historic or prehistoric resource and of historic or prehistoric cultures and lifeways. This proposed rule would not affect any material remains defined as “cultural items” by the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.), including human remains, funerary objects, sacred objects, or objects of cultural patrimony, and subject to the provisions of that statute. The Federal agency would be responsible for ensuring that disposition is conducted in accordance with the proposed rule and 36 CFR 79.7, “Methods to fund curatorial services.”

In addition to providing a mechanism for appropriate and carefully considered disposition, this rule would improve the curation of federally-owned and administered archeological collections, including more effective space and cost management. This proposed

rule would address many of the comments submitted in 1990 by incorporating independent advice and opinions supplied by numerous experts that we consulted while drafting the proposed rule between 2005 and 2013.

This proposed rule was written with the cooperation and consultation of the following Federal agencies and bureaus: Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BR), U.S. Fish and Wildlife Service (FWS), U.S. Air Force (USAF), U.S. Army Corps of Engineers (USACE), U.S. Navy (USN), and U.S. Forest Service (USFS). Each agency and bureau provided a specialist in the curation of archeological collections to participate in an informal interagency working group to provide expert advice during the drafting of this proposed rule.

Section-by-Section Analysis

Section 79.2 Authority

Paragraph 79.2(a) identifies the authorities under which the regulations in Part 79 are promulgated. The proposed rule would streamline the language and citations to these statutory authorities.

Section 79.3 Applicability

Section 79.3 explains the applicability of the regulations in Part 79. The proposed rule would clarify the applicability of these regulations by explaining what constitutes federally-owned and administered collections. The proposed rule would clarify that Part 79 applies to collections (i) that are owned by the United States and for which a Federal agency has practical management authority, either directly or indirectly, as a result of that ownership; and (ii) that are not owned by the United States but that are managed or controlled by Federal agencies under law.

This includes collections administered directly by a Federal agency or controlled by a Federal agency through the terms of an agreement, contract, or permit with a non-Federal organization or entity that is responsible for curation of a collection. This also includes collections for which a Federal agency has administrative authority resulting from authorized expenditures; and situations in which the Federal government has decision-making authority over the collections granted to it by law or regulation. For example, one Federal agency might fund an undertaking on land administered by another Federal agency. In this case, any material remains from such undertaking would be administered by the agency that recovered them.

Collections from Indian lands made under ARPA are another example of federally administered collections. Federal agencies are not the owners of such collections. ARPA and its implementing regulations give BIA the authority to issue Permits for Archeological Investigation (PAIs) for Indian lands and the responsibility for custody of those collections (25 CFR Part 262). For example, Section 5 of ARPA and 43 CFR 7.13(c) apply to resources from both public and Indian lands and discuss the authority to exchange and dispose of resources. Material remains collected under a PAI are subject to the consent of the tribe or Indian before disposal or transfer to a curatorial facility through the BIA permitting process. The fact that these resources may be owned by a tribal or Indian owner does not remove them from Federal administration under ARPA.

Section 79.12 Determining which particular material remains are eligible for disposal

Paragraph 79.12(a) would identify which material remains from collections may be disposed of under the proposed rule. The terms “material remains” and “collection,” as used in the proposed rule, are defined in 36 CFR 79.4. Paragraph 79.12(b) would identify which material remains from collections may not be disposed of under the proposed rule. Paragraph 79.12(c)

would identify who may propose the disposal of material remains from collections. Individuals who propose material remains for disposal should have verifiable knowledge of those particular material remains. The terms “qualified museum professional,” “repository,” and “curatorial services,” as used in the proposed rule, are defined in 36 CFR 79.4. Paragraph 79.12(d) would clarify that the Federal Agency Official, also defined in 36 CFR 79.4, is responsible for the disposition of material remains. Paragraph 79.12(e) would specify criteria to determine when particular material remains may be eligible for disposal because they are of insufficient archaeological interest. As defined in 43 CFR 7.3(a)(1), the term “of archaeological interest” means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics. The criteria in the proposed rule to determine which material remains may be eligible for disposal would distinguish particular material remains that no longer have those capabilities. The criteria would be narrowly defined to ensure that material remains of archaeological interest are not disposed of inadvertently or casually.

Section 79.13 Acceptable methods for disposition of particular material remains

Section 79.13 would outline two procedures by which Federal Agency Officials may determine the methods of disposing of particular material remains. The first would apply to material remains recovered from Indian lands, while the second would apply to material remains that are not from Indian lands.

Paragraph (a) in § 79.13 would identify appropriate methods of disposing of particular material remains determined to be of insufficient archaeological interest that have been excavated or removed from Indian lands after October 31, 1979. As defined in ARPA (16 U.S.C. 470 bb(4)), the term “Indian lands” means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or are subject to a restriction against alienation imposed

by the United States, except for any subsurface interests in land not owned or controlled by an Indian tribe or an Indian individual. The proposed rule would require the Federal Agency Official to offer to return the material remains to the Indian tribe or Indian individual from whose lands the material remains were excavated or removed under ARPA's custody regulations, 43 CFR 7.13(b), 36 CFR 296.13(b), 32 CFR 229.13(b), and 18 CFR 1312.13(b). The tribe or individual may or may not choose to accept custody of these material remains. Determining the appropriate Indian tribe or individual to be approached about disposition would be made based on existing documentation concerning the location of the relevant archeology site.

Paragraph (b) in § 79.13 would identify appropriate methods of disposing of particular material remains determined to be of insufficient archaeological interest that were not excavated or removed from Indian lands. These material remains may be transferred within the Federal agency; transferred to another Federal agency; conveyed to a suitable repository; conveyed to a federally recognized Indian tribe; conveyed to another institution, such as a school or historical society; or—if all of the other methods of disposition are unacceptable—destroyed. These methods were listed in priority order in a draft of the proposed rule sent to leaders of federally recognized tribes in 2009. Based on outreach to tribes in 2013, the methods of disposal in the proposed rule are no longer listed in priority order.

Section 79.14 Restrictions on disposition of particular material remains

Paragraph (a) in § 79.14 would prohibit Federal employees or their relatives from acquiring disposed material remains or benefiting in any way from a disposition.

Paragraph (b) in § 79.14 would prohibit disposed material remains from being traded, sold, bought, or bartered as commercial goods.

Section 79.15 Final determination on disposition of particular material remains

Section 79.15 would describe the process that the Federal Agency Official must follow in order to reach a final determination of disposition of particular material remains. It would also clarify that any determination made under this section must in no way affect the Federal land manager's obligations under other applicable laws and regulations. This section would require the Federal Agency Official to do the following:

- Verify that material remains are appropriately documented through a professional procedure approved by the Federal agency that is consistent with curatorial services as defined in § 79.4(b).
- Establish a collections advisory committee to review proposed dispositions of material remains.
- Retain a representative sample of those material remains determined to be overly redundant and not useful for research.
- Retain all associated records in the archeological collection as defined in § 79.4(a)(2).
- Notify appropriate entities of the proposed disposition and solicit comments on the proposal. If the material remains proposed to be disposed of are from a site on public lands that has religious or cultural importance to an Indian tribe or tribes, the proposed rule would require that these Indian tribes be notified of the proposed disposition.
- Publish a notice of determination of disposition in the Federal Register with specific information that the Federal Agency Official must include in this notice and in the determination itself.

Section 79.16 Objecting to a determination of disposition of particular material remains

This section would describe the process for objecting to a determination of disposition by requesting a review from the DCA, and the process for reaching a final determination of disposition.

Section 79.17 Timing of disposition

Section 79.17 would prevent the disposition of material remains until 30 days after the notice of determination of disposition is published in the Federal Register. If the Federal agency receives an objection to the determination, however, disposal would occur after the Federal Agency Official's notice of decision on the objection and any amendments are published in the Federal Register.

Section 79.18 Administrative record of disposition

Paragraph (a) would identify the types of activities that must be documented in the administrative record supporting the Federal Agency Official's final determination to dispose of particular material remains. This paragraph would require that the administrative record for a disposition of material remains be made public upon request and would require that the Federal agency review and update the catalog and inventory documents related to the disposal.

Compliance with Other Laws, Executive Orders and Department Policy.

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving

regulatory ends. Executive Order 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act.

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This certification is based on information contained in the economic analyses found in the report entitled “Cost-Benefit and Regulatory Flexibility Analyses: Proposed Regulations on the Curation of Federally-Owned and Administered Archeological Collections” that is available online at http://www.nps.gov/archeology/tools/laws/Regulatory_Analyses_36_CFR_Part_79_12.pdf.

Small Business Regulatory Enforcement Fairness Act.

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

The rule relates to internal administrative procedures and management of government function. It does not regulate external entities, impose any costs on them, or eliminate any procedures or functions that would result in a loss of employment or income on the part of the private sector.

Unfunded Mandates Reform Act.

This rule does not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than \$100 million per year. This rule does not have a significant or unique effect on state, local or tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required. This rule produces no costs outside of the Federal government and does not create an additional burden on state, local, or tribal governments, or the private sector.

Takings (Executive Order 12630).

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132).

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. This rule does not regulate, change, or otherwise affect the relationship between Federal and state governments. A federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This proposed rule does not contain collections of information that require approval by the Office of Management and Budget under the Paperwork Reduction Act. This rule would not impose recordkeeping or reporting requirements on state, tribal, or local governments; individuals; businesses; or organizations. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act.

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this rule is covered by a categorical exclusion. This rule is excluded from the requirement to prepare a detailed statement because it qualifies as a regulation of an administrative and procedural nature. (For further information see 43 CFR 46.210(i)). This rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Federal Advisory Committee Act.

Intergovernmental consultation recommended under this rule is exempt from the Federal Advisory Committee Act (FACA). This rule requires that consultation with Indian tribes be conducted between Federal officials and elected tribal officers or their designated employees acting in their official capacities, who meet solely for the purpose of exchanging views, information, or advice related to the management or implementation of this rule. Consultation

with tribes under this rule thus meets the two-part test for an exemption from the FACA set out in the Unfunded Mandates Reform Act of 1995, Pub L. 104-4.

Consultation with Indian Tribes (E.O. 13175 and Departmental policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consult with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified direct effects on federally recognized Indian tribes that will result from this rule. We conducted outreach to tribes and Native Hawaiian Organizations, initiated consultation through two letters to tribal leaders, and conducted face-to-face consultation on this proposed rule upon request. Additional information regarding the identified effects on Indian tribes and these outreach and consultation efforts is contained in a document entitled “Consultation with Indian Tribes (E.O. 13175) regarding the proposed 36 CFR 79.12,” which is available at the following website:

http://www.nps.gov/archeology/tools/laws/Tribal_Consultation_36_CFR_Part_79_12.pdf.

Effects on the Energy Supply (E.O. 13211).

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

Clarity of this regulation.

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;

- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which paragraphs or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Drafting Information. This proposed rule was prepared by the office of the Departmental Consulting Archeologist, National Park Service, Washington, DC with the able assistance of an informal interagency working group. Terry Childs (DOI) drafted the proposed rule and served as chair of the group that included Michael Hilton (USFS), Thomas Lincoln (BR), Eugene Marino (FWS), Kathleen McLaughlin (USN and US Army), Emily Palus (BIA and BLM), Christopher Pulliam (USACE), and James Wilde (USAF). Marvin Keller and Anna Pardo (BIA) and Rochelle Bennett (BR) joined the working group in 2013. David Gadsby (NPS) also joined the group and provided administrative oversight of the proposed rule. Carla Mattix and Stephen Simpson of the Department of the Interior's Office of the Solicitor provided legal guidance.

Public Participation.

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons

may submit written comments regarding this proposed rule by following the instructions in the **ADDRESSES** section of this document.

Public Availability of Comments.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be aware that your entire comment – including your personally identifiable information – may be made publicly available at any time. While you can ask in your comment to withhold your personal identifiable information from public view, we cannot guarantee that we will be able to do so.

List of Subjects in 36 CFR Part 79

Archives and records, Historic preservation, Indians-lands, Museums, Public lands.

In consideration of the foregoing, the National Park Service proposes to amend 36 CFR part 79 as set forth below:

PART 79 – CURATION OF FEDERALLY-OWNED AND ADMINISTERED ARCHAEOLOGICAL COLLECTIONS

1. The authority citation for part 79 continues to read as follows:

Authority: 16 U.S.C. 470aa-mm, 16 U.S.C. 470 *et seq.*

2. Sections 79.1 through 79.4 are designated as subpart A under the following heading:

Subpart A – Administrative Provisions

3. In § 79.2, revise paragraph (a) to read as follows:

§ 79.2 Authority

(a) The regulations in this part are promulgated under 16 U.S.C. 470a(7) which requires that the Secretary of the Interior issue regulations ensuring that significant prehistoric and historic artifacts and associated records are deposited in an institution with adequate long-term curatorial

services. This requirement applies to artifacts and associated records subject to the National Historic Preservation Act (16 U.S.C. 470 et seq.), the Reservoir Salvage Act (16 U.S.C. 469-469c), and the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm).

* * * * *

4. In § 79.3, in paragraph (a) introductory text, add two sentences at the end to read as follows:

§ 79.3 Applicability.

(a) * * * Such collections also include those that are owned by the United States and for which a federal agency has practical management authority, either directly or indirectly, as a result of that ownership; and those collections that are not owned by the United States but that are managed or controlled by a federal agency pursuant to law. The collections described in this paragraph are considered federally-owned and administered for purposes of this part.

* * * * *

5. Sections 79.5 through 79.9 are designated subpart B under the following heading:

Subpart B – Archeological Collections Management

6. Section 79.10 is designated subpart C under the following heading:

Subpart C – Public Access to and Use of Collections

7. Section 79.11 is designated subpart D under the following heading:

Subpart D – Inspections and Inventories of Collections

8. Add subpart E to read as follows:

Subpart E – Disposition of Particular Material Remains

Sec.

79.12 Determining which particular material remains are eligible for disposal.

79.13 Acceptable methods for disposition of particular material remains.

- 79.14 Restrictions on disposition of particular material remains.
- 79.15 Final determination on disposition of particular material remains.
- 79.16 Objecting to a determination of disposition of particular material remains.
- 79.17 Timing of disposition.
- 79.18 Administrative record of disposition.

§ 79.12 Determining which particular material remains are eligible for disposal.

(a) *Which material remains are eligible for disposal?* In order to be eligible for disposal, material remains from collections must be:

(1) Archaeological resources, as defined in 16 U.S.C. 470bb(1), or other resources excavated and removed under the Reservoir Salvage Act (16 U.S.C. 469-469c) or the Antiquities Act (16 U.S.C. 431-433); and

(2) Considered to be of insufficient archaeological interest under the criteria in paragraph (e) of this section, based on the definition of “of archaeological interest” in 43 CFR 7.3(a)(1).

(b) *Which material remains may not be disposed of?* The following material remains from collections may not be disposed of:

(1) Native American “cultural items” as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001(3)), since disposition is governed by that Act and its implementing regulations (43 CFR 10);

(2) Human remains;

(3) Material remains excavated and removed from Indian lands on or before October 31, 1979; and

(4) Material remains excavated and removed from Indian lands under the Antiquities Act (16 U.S.C. 431-433).

(c) *Who may propose the disposal of particular material remains?* The following individuals may propose the disposal of particular material remains from a collection:

- (1) Agency staff members, including archeologists, curators, and conservators; and
- (2) Qualified museum professionals located in a repository that provides curatorial services for a collection held in that repository.

(d) *Who is responsible for the disposal of particular material remains?* The Federal Agency Official is responsible for ensuring that particular material remains are disposed of from collections according to the requirements of this part.

(e) *When are particular material remains considered to be of insufficient archaeological interest?* Particular material remains are considered to be of insufficient archaeological interest when, on a case-by-case basis, at least one qualified archeological or museum professional with experience in the type of material remains being evaluated determines and documents that:

- (1) Disposition of the material remains will not negatively impact the overall integrity of the original collection recovered during the survey, excavation, or other study of a prehistoric or historic resource; and

- (2) At least one of the following three requirements – lack of provenience information; lack of physical integrity; or overly redundant and not useful for research – are met:

- (i) *Lack of provenience information.* Lack of provenience information may be established by one or more of the following circumstances:

- (A) The labels on the material remains or the labels on the containers that hold the material remains do not provide adequate information to reliably establish meaningful archeological context for the material remains;

- (B) The labels on the material remains or the labels on the containers that hold the material remains have been lost or destroyed over time and cannot be reconstructed through the associated records; or

(C) The associated records of the material remains have been lost or destroyed and cannot be recovered after a concerted effort to find them is performed and documented.

(ii) *Lack of physical integrity.* Material remains lack physical integrity when, subsequent to recovery during the survey, excavation, or other study of a prehistoric or historic resource, the material remains were irreparably damaged through decay or decomposition over time, or as a result of a human-caused incident or a natural disaster.

(iii) *Overly redundant and not useful for research.* A determination that material remains are overly redundant and not useful for research must be carefully considered. Archeological context, research questions, and research potential may vary based on geography, time and culture period, scientific or cultural significance, prior analysis, and other factors. It is difficult to predict if future analytical methods will yield useful information about the material remains proposed for disposal. As a result, a representative sample of material remains that are determined to be overly redundant and not useful for research must be retained for curation, as required by § 79.15(d).

§ 79.13 Acceptable methods for disposition of particular material remains.

(a) Material remains excavated or removed from Indian lands after October 31, 1979, that are archaeological resources under the Archaeological Resources Protection Act (16 U.S.C. 470aa-mm) remain the property of the Indian individual or Indian tribe having rights of ownership over the resources. Under the authority of 16 U.S.C. 470dd, disposition of these material remains that are determined to be of insufficient archaeological interest under the criteria in § 79.12(e) are subject to the consent of the Indian individual or Indian tribe. The Federal Agency Official must use the following methods of disposal for these material remains in the following order:

(1) Return them to the Indian individual or Indian tribe having rights of ownership under the Archaeological Resources Protection Act's custody regulations, 43 CFR 7.13(b), 36 CFR 296.13(b), 32 CFR 229.13(b), and 18 CFR 1312.13(b).

(2) If the Indian individual or Indian tribe having rights of ownership does not wish to accept them, the Federal Agency Official may otherwise dispose of the material remains using the disposition methods in § 79.13(b) after receiving written consent from the Indian individual or Indian tribe having rights of ownership.

(b) This paragraph applies to material remains that are determined to be of insufficient archaeological interest under § 79.12(e) and that were excavated or removed from lands that are not Indian lands. The Federal Agency Official may use any of the following methods for disposal of the material remains.

(1) Transfer to another Federal agency.

(2) Convey to a suitable public or tribal scientific or professional repository as defined in § 79.4(j) of this part.

(3) Convey to a federally recognized Indian tribe if the material remains were excavated or removed from lands of religious or cultural importance to that tribe and were identified and documented by a Federal land manager under 43 CFR 7.7(b)(1).

(4) Convey to a federally recognized Indian tribe from whose aboriginal lands the material remains were removed. Aboriginal occupation may be documented by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(5) Transfer within the Federal agency for the purpose of education or interpretation, or convey to a suitable institution to be used for public benefit and education including, but not limited to, local historical societies, university or college departments, and schools.

(6) If the Federal Agency Official considers each of these prior methods carefully and is still unable to find an acceptable method of disposition, then destruction may be considered. The Federal Agency Official or their designee must witness and document the destruction, including through photography or video.

§ 79.14 Restrictions on disposition of particular material remains.

(a) *Can Federal employees and their relatives acquire disposed material remains?* No. Federal employees or their relatives cannot acquire disposed material remains (or a financial interest therein) and must not appear to benefit personally in any way from an action to deaccession or dispose of archeological material remains.

(b) *Can disposed material remains be regarded as commercial goods?* No. Disposed material remains may not be traded, sold, bought, or bartered as commercial goods.

§ 79.15 Final determination on disposition of particular material remains.

The Federal Agency Official is responsible for ensuring that the agency disposes of material remains according to the requirements of this part. A determination made under this part in no way affects the Federal land manager's obligations under other applicable laws or regulations. The Federal Agency Official must carry out all of the following steps before making a final determination that it is appropriate to dispose of material remains.

(a) The Federal Agency Official must determine that the material remains are eligible for disposal under the criteria in § 79.12(a), including a written verification that no Native American

“cultural items” as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001(3)) are considered for disposal.

(b) The Federal Agency Official must verify that the material remains are appropriately documented through a professional procedure approved by the Federal agency that is consistent with curatorial services, including accessioning and cataloging, as defined in § 79.4(b) of this part.

(c) The Federal Agency Official must establish a collections advisory committee of at least five members to review proposed dispositions of material remains and make recommendations to the Federal Agency Official about proposed dispositions based on the adequacy of the documentation addressing the requirements in § 79.15(a) and (b) and the appropriateness of the proposed disposition.

(1) The collections advisory committee must consist of qualified employees from Federal agencies who meet appropriate Professional Qualification Standards set by the Secretary of the Interior, and must include the principal archeologist and curator of the Federal agency that owns or administers the material remains if either of these two positions exists.

(2) Committee members must include Federal employees with subject matter or technical expertise. These employees may include archeologists, anthropologists, curators, and conservators with expertise in historic, prehistoric, or underwater material remains.

(3) Committee members may include one or more members of a federally recognized Indian tribe regularly consulted by the Federal agency who are elected tribal officers or their designated employees acting in their official capacities.

(4) The committee must have written procedures, including terms of member appointments and duration of the committee, approved by the Federal Agency Official to ensure all recommendations of disposal are fair, open, timely, and in the best interests of the public.

(5) Federal employees or qualified members of federally recognized Indian tribes may be temporarily added to the committee if its current members determine that specific expertise is needed on a case-by-case basis.

(6) Committee members or their family members may not benefit financially or in any other way from a disposition of material remains.

(d) The Federal Agency Official must retain a representative sample of those material remains determined to be overly redundant and not useful for research.

(1) The size of the representative sample must be large enough to permit future analysis for research purposes.

(2) The method for establishing a representative sample, including sample size and typology, must be determined by a qualified museum or archeological professional with expertise in the type of prehistoric or historic material remains being sampled.

(3) The sampling method must be well documented and consistent with professional prehistoric or historic archeological practice.

(e) The Federal Agency Official must retain all associated records in the archeological collection as defined in § 79.4(a)(2) of this part. A copy of the original associated records must be given to the recipient of any transferred or conveyed items subject to the restrictions stipulated in the Archaeological Resources Protection Act (16 U.S.C. 470hh(a)).

(f) The Federal Agency Official must notify the entities listed in this paragraph of the proposed disposition and solicit comments on the proposal. Notifications must be made in

writing, and must include a deadline for submitting comments, in accordance with procedures established by the Federal agency. All written comments must be reviewed and responded to by the Federal Agency Official and the collections advisory committee. Notice must be given to the following:

(1) The State Historic Preservation Officer from the state(s) where the particular objects to be disposed were recovered.

(2) The Tribal Historic Preservation Officer (or other designated tribal representative) from the tribal land(s) where the particular objects to be disposed were recovered.

(3) Federal, state, tribal, or local agencies that were involved in the recovery of the objects to be disposed.

(4) Universities, museums, scientific institutions, and educational institutions with an active department of or program in archaeology or anthropology that have interest in the archaeology of the region from which the objects to be disposed of were recovered.

(5) Indian tribes that consider the land to have religious or cultural importance, if the material remains are from a site on public lands that has religious or cultural importance to Indian tribes under 43 CFR 7.7(b)(1).

(6) Indian tribes from whose aboriginal lands the material remains were removed, if aboriginal occupation has been documented by a final judgment of the Indian Claims Commission or the United States Court of Claims, treaty, Act of Congress, or Executive Order.

(g) The Federal Agency Official must, after the comment period described in § 79.15(f) has expired, publish a notice of determination of disposition in the Federal Register.

(1) The notice published in the Federal Register must include the following:

(i) A general description of the material remains to be disposed.

(ii) The criteria used to determine that the material remains are of insufficient archaeological interest under § 79.12(e).

(iii) The method of disposal.

(iv) The name of the Federal Agency Official or their designee as a point of contact.

(v) An explanation of a person's right to object to the determination of disposition under § 79.16 and the name and address of the Department of the Interior's Departmental Consulting Archeologist.

(2) The determination referenced by the notice must include the following:

(i) A detailed list of the material remains to be disposed, including a description of each object, or lot of objects if there are multiples of a particular type, and a photograph of the objects when appropriate.

(ii) The criteria used to determine that the material remains are of insufficient archaeological interest under § 79.12(e).

(iii) Justification of the method to be used to dispose of the material remains under § 79.13.

(iv) Documentation that all of the procedures in §§ 79.15 and 79.16 have been met.

(v) The name of the recipient entity or method of destruction, as appropriate.

(vi) The name of the Federal Agency Official or their designee as a point of contact.

(vii) Other conditions of transfer or conveyance, as appropriate.

(viii) A statement that the determination is a final agency action under the Administrative Procedure Act unless an objection is filed in accordance with § 79.16.

§ 79.16 Objecting to a determination of disposition of particular material remains.

Anyone may object to and request in writing that the Departmental Consulting Archeologist review a Federal Agency Official's determination to dispose of material remains within 30 days of publication in the Federal Register. The request must document why the requester disagrees with the Federal Agency Official's determination or the terms and conditions to be applied to the disposal. The procedure for objecting to a determination of disposition is as follows:

(a) The request must be sent to the Departmental Consulting Archeologist, whose address must be published with the notice of determination of disposition in the Federal Register. The Departmental Consulting Archeologist must immediately forward a copy of the request to the Federal Agency Official who made the determination under objection. The Federal Agency Official must postpone the planned disposition until the Departmental Consulting Archeologist completes the requested review.

(b) The Departmental Consulting Archeologist must review the request, the Federal Agency Official's determination, and its supporting documentation.

(c) Within 60 days of receipt of the request, the Departmental Consulting Archeologist must transmit to the Federal Agency Official a non-binding recommendation for further consideration.

(d) The Federal Agency Official must consider the recommendation in making a final determination. Within 60 days of receipt of the recommendation, the Federal Agency Official must respond to the Departmental Consulting Archeologist and the requester with a final determination. The final determination must include any information on administrative appeal rights required by internal agency appeal procedures or a statement that the final determination is a final agency action under the Administrative Procedure Act, as appropriate.

(e) The Federal Agency Official must publish notice of the decision on the objection and any amendments made to the original determination of disposition in the Federal Register.

§ 79.17 Timing of disposition.

Disposition will occur no sooner than 30 days after the notice of determination of disposition is published in the Federal Register under § 79.15(g). If the Federal agency receives an objection under § 79.16, however, disposal will occur after the Federal Agency Official's notice of decision and any amendments are published in the Federal Register under § 79.16(e).

§ 79.18 Administrative record of disposition.

(a) After the Federal Agency Official has made a final determination of disposition, he or she must document the determination and retain the administrative record as used in the definition of associated records in § 79.4(a)(2), which must include:

(1) The professional evaluation of the material remains, conducted under § 79.12(e) and § 79.15(b).

(2) The recommendations and rationale of the collections advisory committee provided in accordance with § 79.15(c).

(3) Notifications of the proposed disposition under § 79.15(f); consent of Indian individuals or tribes, if applicable, under § 79.13(a); and comments received from the parties notified under § 79.15(f).

(4) Requests for review received by the Departmental Consulting Archeologist, the non-binding recommendation of the Departmental Consulting Archeologist, and the response by the Federal Agency Official to the Departmental Consulting Archeologist and the requester, as appropriate, under § 79.16.

(5) The disposition action with specific information, including a description and evaluation of objects; the method of disposition and the reason for the method chosen; names and titles of persons initiating and approving the disposition; date of disposition; relevant accession and catalog numbers; evidence of the receipt for the return, transfer, or conveyance of the material remains by the recipient tribe, agency, repository, or institution, including the title to the received material remains, as appropriate; photographic documentation, as appropriate; and the name and location of the recipient institution or entity, as appropriate.

(6) A detailed inventory of the reasonable and representative sample of material remains retained, when the larger proportion is disposed of because it is overly redundant and not useful for research.

(7) Other activities and decisions pertaining to the disposition of the material remains, such as conditions of use after the disposition is completed, as appropriate.

(b) The administrative record must be made available to the public upon request, unless the information or a portion of it must be withheld under the terms of the Freedom of Information Act (5 U.S.C. 552) or the Archaeological Resources Protection Act (16 U.S.C. 470hh). The latter restricts the government's ability to make sensitive information, such as archeological site location data, available to the public.

(c) After disposition, the accession and catalog records must be reviewed and amended through a procedure established by the Federal agency. The amendments must identify the material remains that were deaccessioned and disposed of, the date of disposition, and the manner in which they were disposed. The documentation prepared under §§ 79.15 through 79.16 and 79.18(a) must be retained.

Dated: November 5, 2014.

Michael Bean,
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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